Filed 6/29/05

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PHILLIP ARNO, Plaintiff and Appellant, v. HELINET CORPORATION et al., Defendants and Appellants.	B170367 (Los Angeles County Super. Ct. No. LC052436)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith Chirlin, Judge. Affirmed.

Good, West & Schuetze, Ned Good, Steven Schuetze; Jacobs, Jacobs & Rosenberg, Stanley Jacobs; Evan D. Marshall, for Plaintiff and Appellant.

Horvitz & Levy, LLP, Lisa Perrochet, Jon B. Eisenberg; Bailey & Partners, Carolyn J. Shields, Allan M. Bower and Jonathan S. Morse, for Defendants and Appellants.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of Discussion, part A and part C.

INTRODUCTION AND BACKGROUND

Plaintiff, appellant and cross-respondent Phillip Arno (Arno) was injured in the crash of a helicopter piloted by defendant, respondent and cross-appellant Kris Kelley (Kelley), operated by Kelley's employer, defendant, respondent and cross-appellant Helinet Corporation (Helinet), and owned by the Purwin Company, a defendant.[1] During discovery, defendants denied Arno's request for admissions concerning causation and liability. Arno also served on defendant Kelley a settlement offer pursuant to Code of Civil Procedure[2] section 998 of $999,999.99. Upon the expiration of that offer, which Kelley did not accept, Arno made an identical section 998 offer to defendant Helinet. Helinet did not accept that settlement offer. Just before the trial, defendants filed, with court permission, an amended answer admitting liability.

Following a trial on the issue of damages, the jury awarded Arno $13,149,099. Arno moved, pursuant to Civil Code section 3291, for $3,505,225.57 in prejudgment interest from the date of the section 998 offer to Kelley, under section 998 for expert witness fees and other costs, and under section 2033, subdivision (o), for $200,675 in attorney fees. The trial court awarded Arno $3,505,226 in prejudgment interest under Civil Code section 3291 and $160,874.75 for expert witness fees and other costs under section 998, but denied Arno's motion for attorney fees under section 2033, subdivision (o). The parties filed this appeal and cross-appeal.

Arno appeals from the denial of his section 2033, subdivision (o) motion to recover $200,675 in attorney fees. Arno contends he was entitled to such fees because Kelley, Helinet and the Purwin Company, after initially refusing, without reasonable justification, to admit certain facts in request for admissions relating to causation and

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[1] Arno named another defendant that was dismissed. He filed a separate action against the Purwin Company that was consolidated with this action.

[2] All further statutory references are to the Code of Civil Procedure, unless otherwise stated.

liability, admitted liability and causation just before the trial. Arno seeks the fees he incurred in obtaining evidence to prove these facts.

Defendants in their cross-appeal challenge the trial court's awards under Civil Code section 3291 of $3,505,226 in prejudgment interest from the date of a section 998 offer and under section 998 of $160,874.75 in expert fees and other costs. They contend that Arno's settlement demand of $999,999.99, to defendant Kelley was not made in good faith. Defendants argue that the interests of their insurer should be considered when assessing the reasonableness of a settlement offer under section 998. Defendants contend that the insurer, which controlled the defenses of both defendants Kelley and Helinet, had nothing to gain by accepting the offer to Kelley because its exposure would not be reduced. Defendants further argue that the applied rate of interest specified in Civil Code section 3291 is unconstitutionally excessive in view of today's market interest rate.

In the published portion of this opinion, we hold that the trial court did not abuse its discretion in determining that Arno's settlement offer to Kelley under section 998 was reasonable and in good faith even though the same insurer had undertaken the defense of all the defendants and the purported liability of Helinet was based in large part on the acts of its agent, Kelley. In the unpublished portion of this opinion, we hold as follows: (1) Arno is not entitled to attorney fees under section 2033, subdivision (o) because defendants' concessions obviated any need to "prove" the matters set forth in Arno's request for admissions, and such proof is a prerequisite to recovery under the statute (§ 2033, subd. (o); *Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 865-866 (*Stull*); *Wagy v. Brown* (1994) 24 Cal.App.4th 1, 6 (*Wagy*)); and (2) the rate of interest specified in Civil Code section 3291 is not unconstitutionally excessive. We therefore affirm the judgment.

[The following Discussion, part A is not for publication]

DISCUSSION

A. Attorney Fees For Denial of Facts in Request for Admissions

Section 2033, subdivision (o) provides: "If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this section, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make this order unless it finds that (1) an objection to the request was sustained or a response to it was waived under subdivision (*l*), (2) the admission sought was of no substantial importance, (3) the party failing to make the admission had reasonable ground to believe that that party would prevail on the matter, or (4) there was other good reason for the failure to admit."[3]

"The determination of whether a party is entitled to expenses under section 2033, subdivision (o) is within the sound discretion of the trial court." (*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 637, fn. 10.) "More specifically, '[s]ection 2033, subdivision (o) clearly vests in the trial judge the authority to determine whether the party propounding the admission thereafter proved the truth of the matter which was denied.' [Citation.] An abuse of discretion occurs only where it is shown that the trial court exceeded the bounds of reason. [Citation.] It is a deferential standard of review that requires us to uphold the trial court's determination, even if we disagree with it, so long as it is reasonable." (*Stull, supra,* 92 Cal.App.4th at p. 864.)

Arno contends section 2033, subdivision (o) mandates an expense award in this case, focusing on language in the statute that states, "The court *shall* make this order

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[3] Section 2033 has been repealed, effective July 1, 2005, by Assembly Bill 3081, Stats. 2004, ch. 182, § 22. The provisions of section 2033, subdivision (o), were reenacted without significant change as section 2033.420, operative on July 1, 2005.

[requiring the party who refused to admit to pay reasonable expenses] *unless* it finds" an objection was sustained or a response waived, the admission was not of substantial importance, the party refusing the admission had reasonable grounds to believe it would prevail, or there was good reason for the failure to admit. (§ 2033, subd. (o), italics added.) He argues that the trial court made none of these findings and therefore was required to issue an order awarding expenses. The statutory language, however, requires the party requesting the admission to "prove[] . . . the truth of that matter" as a prerequisite to moving for an award of expenses. (§ 2033, subd. (o).) Absent such proof, the trial court could not award expenses, including attorney fees, under the statute. (*Stull, supra,* 92 Cal.App.4th 860; *Wagy, supra,* 24 Cal.App.4th 1.) Arno contends that courts of appeal decisions that hold that attorney fees may not be awarded for wrongful denial of request for admissions if the matter is admitted before trial (*Stull, supra,* 92 Cal.App.4th 860; *Wagy, supra,* 24 Cal.App.4th 1) are incorrect and urges this court to adopt a contrary rule.

In *Wagy, supra,* 24 Cal.App.4th 1, the plaintiff sued the defendants for personal injuries arising from an automobile accident. In response to the plaintiff's request for admissions, the defendants denied negligence, but subsequently admitted for purposes of arbitration that they were negligent, thus eliminating the need for proof on that issue. In reversing the trial court's grant of attorney fees to the plaintiff under section 2033, subdivision (o), the Third Appellate District Court of Appeal explained that the statute authorizes an award of attorney fees incurred "in proving any matter where the proof is necessitated by an opposing party's denial of a request for admissions." (*Id.* at p. 6.) The court went on to note that under Evidence Code section 190, "'"Proof" is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier of fact or the court'", and that "[g]iven this definition, preparation for trial or arbitration is not the equivalent of proving the truth of a matter so as to authorize an award of attorney fees under section 2033, subdivision (o). Expenses are recoverable only where the party requesting the admission 'proves . . . the truth of that matter,' not where that party merely prepares to do so." (*Ibid.*)

The definition of "proof" set forth in the Evidence Code and relied upon by the court in *Wagy,* was derived from former section 1824 (Stats.1965, ch. 299, § 2), which provided: "'Proof is the effect of evidence, the establishment of a fact by evidence.'" (See *People v. Mahoney* (1939) 13 Cal.2d 729, 732.) "There is an obvious difference between the words evidence and proof. The former, in legal acceptation, includes the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. The latter is the effect or result of evidence." (*Schloss v. His Creditors* (1866) 31 Cal. 201, 203.)

In *Stull, supra,* 92 Cal.App.4th 860, the Fourth Appellate District Court of Appeal also denied an expense award under section 2033, subdivision (o) against defendants who had initially refused to admit liability in response to the plaintiff's request for admissions, but subsequently conceded liability on the eve of trial. The court stated "[T]hat an issue be proved is an express statutory prerequisite to recovery under section 2033, subdivision (o). Proof is something more than just evidence. It is the establishment of a fact in the mind of a judge or jury by way of evidence. [Citation.] Until a trier of fact is exposed to evidence and concludes that the evidence supports a position, it cannot be said that anything has been proved." (*Id.* at pp. 865-866.)

Both *Stull, supra,* 92 Cal.App.4th 860, and *Wagy, supra,* 24 Cal.App.4th 1, confirm that proof of the matter sought in a request for admissions is a prerequisite to recovery under section 2033, subdivision (o). (§ 2033, subd. (o); *Stull, supra,* 92 Cal.App.4th at p. 865.) Until this statutory prerequisite is satisfied, the trial court has no authority or discretion to award expenses under section 2033, subdivision (o). (*Ibid;* see 3 DeMeo, Cal. Deposition and Discovery Practice (2004) § 63.60(1)(a), p. 63-51 (DeMeo) ["'Proof,' for purposes of the statute is 'the establishment of a fact in the mind of a judge or jury by way of evidence'"].)

Arno contends that "proof" under section 2033, subdivision (o) does not necessarily mean proof at trial, relying on a footnote in *Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500 (*Brooks*), in which the court stated, "a party need not be permitted to escape all responsibility for the expenses of an opponent, simply because a

denial was changed to an admission before trial." (*Id.* at p. 510, fn. 6.) The issue of whether the moving party had proved the truth of the matter initially denied by the defendants in response to the request for admissions was not before the court in *Brooks*. As the court in *Stull, supra,* 92 Cal.App.4th at pages 866-867 noted, the court in *Brooks* "focused on whether there were good reasons for the defendants' denial of the request for admission . . . . [T]he *Brooks* court did not address the issue of whether the plaintiff had proved the truth of the matter the defendants denied." As to the language of the footnote in *Brooks*, the court in *Stull* said, "We decline to follow this implied comment because it patently omits any consideration of the requirement that an issue must be proved in order to merit an award under section 2033, subdivision (o)." (*Stull, supra,* 92 Cal.App.4th at p. 867.)

Garcia v. Hyster Co. (1994) 28 Cal.App.4th 724, another case upon which Arno relies, is distinguishable. In that case, the court held that a successful motion for non-suit satisfied the proof requirement of section 2033, subdivision (o). (*Id.* at p. 735.) As the court in *Stull, supra,* 92 Cal.App.4th at page 867 noted: "The plaintiff in *Garcia,* in its case-in-chief, submitted evidence that demonstrated that the facts that the defendant sought to have admitted were indeed true. Because the nonsuit was based upon these facts, the court exercised its discretion and held that it could be concluded that the facts had been proved." In *Stull,* in contrast, "there [was] no indication in the record that any evidence on the issue of liability was offered." (*Id.* at p. 867.) The same is true in the instant case.

Arno states that defendants have judicially admitted facts and that such a judicial admission either dispenses with the need for proof or constitutes the proof itself. But if proof is rendered unnecessary under section 2033, subdivision (o), the matter has not been proved. A judicial admission does not mean that the matter has been proved. In California, a judicial admission is not viewed as evidence. It is "a conclusive concession of the truth of the matter and has the effect of removing it from the issues." (1 Witkin,

Cal. Evidence (4th ed. 2000) Hearsay, § 97, p. 799.)[4] Thus, the fact that is the subject of the judicial admission need not be proved.

Arno urges us to overlook the plain language of the statute requiring a party seeking expenses for a failure to admit to "prove[] . . . the truth of that matter," and argues that the legislative history and public policy support an expense award under section 2033, subdivision (o) even absent such proof, if the party refusing to admit has done so without reasonable justification. To ignore the plain language of the statute, however, would be inconsistent with certain fundamental rules of statutory interpretation. "[T]he objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the language of a statute is clear, we need go no further." (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340.) Only when the statutory language is ambiguous and susceptible to more than one reasonable interpretation do "we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]" (*Ibid.*) Here, the language of the statute is clear – a party must first "prove[]" the truth of the matter sought in a request for admissions before seeking "expenses incurred in making that proof . . . ." (§ 2033, subd. (o).) There is accordingly no need to consider extrinsic aids, such as public policy and legislative history to ascertain the legislative intent behind the statute. (*Nolan v. City of Anaheim, supra,* 33 Cal.4th at p. 340.)[5]

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[4] See BAJI instruction 1.02 (stipulation of fact or admission by counsel means fact "conclusively proved").

[5] Section 2033 is based upon Rule 37 of the Federal Rules of Civil Procedure (3 DeMeo, Cal. Deposition and Discovery Practice (2004) § 63.60(1)(b) at p. 63-52; *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376, fn. 4). Rules 37(c) of the Federal Rules of Civil Procedure provides that if the party requesting the admissions "proves" the matter, the requesting party may apply to the court for expenses, including

Arno maintains that public policy favors sanctioning defendants' conduct in this case by requiring them to pay expenses Arno incurred to obtain the evidence necessary to prove the matters that defendants' initially denied but subsequently admitted on the eve of trial. He argues that section 2033, subdivision (o) is part of a statutory scheme intended to deter "gamesmanship" and to ensure timely compliance with discovery requests. Applying the statute in the manner Arno suggests, however, might motivate parties to "use the threat of potentially enormous cost and fee awards in an attempt to coerce admissions early in a case, prior to the completion of discovery. . . ." (*Stull, supra*, 92 Cal.App.4th at p. 868.) A party that has denied a fact in a request for admissions, might avoid sanctions by conceding the fact prior to or even during trial. The court noted in *Stull, ibid.*, that "[s]uch bad faith actions may be subject to sanction under other statutes."[6] Moreover, the trial court might preclude delayed pleading and discovery amendments. Whether or not such meaningful redress exists for abuse of the discovery or pleading provisions, we cannot avoid the plain language of section 2033, subdivision (o) that authorizes an expense award only if the moving party proves the matter sought to be admitted.

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attorney fees. Federal authorities apply the same analysis we do. (See *Joseph v. Fratar* (D.Mass. 2000) 197 F.R.D. 20, 22; *Board of Directors v. Anden Group* (E.D.Va. 1991) 136 F.R.D. 100, 105-106; 7 Moore's Federal Practice (3d ed. 2003) § 37.72 (Wayne Brazil), p. 37-131; 8A Wright, Miller & Marcus, *supra*, § 2290, pp. 706-709; contra *Johnson International Company v. Jackson National Life Insurance Company* (D. Neb 1993) 812 F.Supp. 966, aff'd on other grounds (8th Cir. 1994) 19 F.3d 431, 438-439.)

[6] The court in *Stull, supra*, 92 Cal.App.4th at p. 868 cited sections 128.7, subdivisions (b)(1), (3) and (4), 2023, subdivisions (a)(3) and (6), (b). The latter has been repealed, effective July 1, 2005 by Assembly Bill 3081, Stats. 2004, ch. 182, section 22 and reenacted as section 2023.010.

[The following Discussion, part B is for publication]

B. Expert Witness Fees, Costs and Interest as a Result of Section 998

Section 998, subdivision (d) provides as follows: "If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's costs." Civil Code section 3291 provides, "If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment."

Kelley argues that she should not be responsible for such fees, costs and interest by virtue of section 998 because Arno did not make the offer in good faith. Kelley contends that when Arno made the statutory offer of settlement only to her, he knew it had no reasonable prospect of acceptance because one insurance company covered all the defendants and controlled the defense; after a settlement with, and dismissal of, Kelley, Arno would be free to pursue and obtain a judgment against Kelley's co-defendants for the full amount of the verdict less a set off of the settlement amount or a portion of that settlement amount; and thus, the insurer would have gained nothing by Kelley accepting the offer. According to Kelley, the offer was just a ploy to secure the benefits of section 998 with no legitimate expectation of a settlement. (See *Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal.App.3d 53, 63; *Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821-822 (*Wear*).)

Notwithstanding that section 998 contains no express good faith or reasonable offer component, Courts of Appeal have concluded that "the Legislature intends that only good faith settlement offers qualify as valid offers under section 998." (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 698 (*Elrod*); *Wear, supra,* 121 Cal.App.3d at p. 821 ["We believe that in order to accomplish the legislative purpose of encouraging settlement of litigation without trial [citation], a good faith requirement must be read into section 998"].) The courts have added that to qualify as a good faith offer, it must be "realistically reasonable under the circumstances of the particular case" and must carry with it some reasonable prospect of acceptance. (*Wear, supra,* 121 Cal.App.3d at p. 821.) "One having no expectation that his or her offer will be accepted will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees." (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262-1263.) Reasonableness depends upon the information available to the parties. (See *Elrod, supra,* 195 Cal.App.3d at p. 699 ["reasonableness of an offer may lie in the eye of its beholder"].)

"If the offer is in a range of reasonably possible results and the offeree has reason to know the offer is reasonable, then the offeree must accept the offer or be liable for costs under Code of Civil Procedure section 998." (*Thompson v. Miller* (2003) 112 Cal.App.4th 327, 339.) "[W]hether a section 998 offer was reasonable and made in good faith is a matter left to the sound discretion of the trial court." (*Elrod, supra,* 195 Cal.App.3d at p. 700.) "However, when a party obtains a judgment more favorable than its pretrial offer, it is presumed to have been reasonable and the opposing party bears the burden of showing otherwise." (*Thompson v. Miller, supra,* 112 Cal.App.4th at pp. 338-339.) An appellate court reviewing a section 998 offer may not substitute its opinion for that of the trial court unless there has been a clear abuse of discretion, resulting in a miscarriage of justice. (*Id.* at p. 339.)

Generally, the reasonableness of a section 998 offer is measured by the potential recovery the defendant will have to pay plaintiff premised upon the "information that was known or reasonably should have been known" to the offeror and whether that

information "was known or reasonably should have been known" to the offeree. (*Elrod, supra,* 195 Cal.App.3d at p. 699.) When Kelley, in effect, rejected Arno's offer, she did not refer to insurance factors at all. Rather, in objecting to the offer as not being made in good faith, she asserted that at that time she lacked sufficient knowledge of the facts—one of the appropriate "tests." (*Elrod, supra,* 195 Cal.App.3d at p. 699 [offer must satisfy a "second test: whether defendant's information was known or reasonably should have been known to [the offeree] . . . the section 998 mechanism works only where the offeree has reason to know the offer is a reasonable one"].)

The interests of the defendants' insurer did not restrict the trial court's discretion. Section 998 provides for service of a pretrial settlement offer to a *party* to the action, not to that party's insurer. (§ 998, subds. (b), (c), (d) and (e).) Service of a section 998 offer on the insurer of a party is not even valid. (*Moffet v. Barclay* (1995) 32 Cal.App.4th 980, 983 ["Not only the language of section 998 itself, but general principles of contract law militate against serving a section 998 offer on an insurer"]; see Flahaven, et al, California Practice Guide: Personal Injury (The Rutter Group 2004) § 4:163.3d, p. 4-51 (Flahaven).) The existence of an insurance policy is not a guarantee that the insurer is obligated under the policy to provide coverage or a defense for a given action. (*Moffett v. Barclay, supra,* 32 Cal.App.4th at p. 984.) Even if the insurer does provide a defense, it may be doing so subject to a reservation of rights against coverage. A plaintiff cannot assume that the insurer is legally obligated to compromise the action or to act as the insured's agent for purposes of settling the action. (*Ibid.*)

Moreover, that Arno's section 998 offer to Kelley did not relieve other defendants of liability or that Helinet might remain liable based on a theory of respondeat superior does not bar recovery under section 998.[7] (See *Milicevich v. Sacramento Medical Center* (1984) 155 Cal.App.3d 997, 1006-1007 [court, in rejecting a "multilateral" reading of the section, said that "[i]f a single defendant tenders a reasonable compromise as a section

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[7] There were claims against Helinet and the other codefendant not based on Kelley's alleged negligence.

998 offer, the measure for assessing mandatory sanctions is the judgment viewed bilaterally between that defendant and the plaintiff"].) Section 998 does not require a plaintiff to make a global settlement offer to all defendants in an action, or to make an offer that resolves all aspects of a case. (See *Deocampo v. Ahn* (2002) 101 Cal.App.4th 758, 777.) When multiple defendants have jointly made a settlement offer to a single plaintiff without indicating how the offer is to be allocated among them, it has been held too uncertain to result in section 998 penalties, because it cannot be determined whether any individual plaintiff's recovery at trial was more favorable than the offer. (*Meissner v. Paulson* (1989) 212 Cal.App.3d 785, 790-791; *Randles v. Lowry* (1970) 4 Cal.App.3d 68, 74; see *Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579, 584-586.)

Although the interests of the insurer may not necessarily be a factor in determining the reasonableness of a 998 offer, that does not mean that the existence of insurance is not a factor for the offeror or the court to consider. Insurance, as other factors, does not preclude judicial discretion as to whether a section 998 offer is in good faith, but may be considered by the trial court in exercising its discretion. Anything that may impact the reasonableness of a section 998 offer may be considered by the trial court. The court in *Culbertson v. R.D. Werner, Co., Inc.* (1987) 190 Cal.App.3d 704, in holding that a party is not required to take into consideration liens pending against a judgment that would reduce the ultimate recovery to the plaintiff, said, "This is not to say that the judge may not take such liens into consideration, along with other evidence . . . when *exercising his discretion* to award or deny expert witness fees." (*Id.* at p. 708, italics in original.)

Kelley argues that because of the particular circumstances of this case, she and her insurer acted reasonably in rejecting Arno's section 998 offer. But "there is no judicially created reasonable rejection exception to the operation of section 998." (*People ex rel. Lockyer v. Fremont General Corp.* (2001) 89 Cal.App.4th 1260, 1270 [rejecting State's contention it could not accept a section 998 offer when it sought injunctive relief and damages for a class of consumers because of conflict with regard to distribution of proceeds among victims].)

There were a number of factors that justify the trial court's discretion in awarding section 998 costs. There was no contention on appeal that the parties were unaware of material facts. The sum is presumed reasonable in view of the recovery. By settling, Kelley could avoid any exposure to her employer. (§ 877.6 [good faith settlement eliminates liability to a codefendant]; *Popejoy v. Hannon* (1951) 37 Cal.2d 159, 173 [a principal subjected to liability to third persons for agent's tort may seek indemnification against agent].) Even if one took into account the insurer or other defendants, the nonsettling defendants would receive a credit for the settlement amount or a portion of it. (See § 877(a); Civ. Code, §§ 1431, 1431.2.) And dismissing Kelley would result in an "empty chair" situation, which might be desirable for defendants. (See Flahaven, *supra*, § 4:180, p. 4-84.1.)

The trial court concluded that partial settlement and dismissal of one of the parties fulfills the purpose of section 998. That purpose is to encourage settlements "by imposing a strong financial disincentive on a party that fails to obtain a more favorable result at trial." (*People ex rel. Lockyer v. Fremont General Corp.*, *supra*, 89 Cal.App.4th at p. 1271.) That purpose would be frustrated if a party could elude the application of the statute by being able to restrict a trial court's discretion with considerations facing that party's insurer or other co-defendants. Notwithstanding any strategies that could be attributed to Arno, the trial court did not abuse its discretion in applying section 998 sanctions in this case.

[The following part C is not for publication]

C. Prejudgment Interest Under Civil Code Section 3291

Civil Code section 3291 provides in part: "If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment." The ten percent rate of interest prescribed by Civil Code section 3291 is authorized by the California Constitution, which enables the Legislature to set a legal rate of interest "at not more than 10 percent per annum," and which "may be variable and based upon interest rates charged by federal agencies or economic indicators, or both." (Cal. Const., Art. XV, § 1.)

Defendants argue for the first time on appeal that the ten percent rate of interest provided for by Civil Code section 3291 imposes an onerous penalty for failure to accept a demand for payment, in violation of the due process clause of the Fourteenth Amendment of the United States Constitution. They argue that the disparity between the statutory interest rate and prevailing rates of interest in the market today violates due process and that Civil Code section 3291 is therefore facially unconstitutional. Although this issue was not argued before the trial court, constitutional issues may be raised and considered for the first time on appeal. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394.)

"'[T]he constitutionality of measures affecting . . . economic rights under the due process clause does not depend on a judicial assessment of the justifications for the legislation or of the wisdom or fairness of the enactment . . . . So long as the measure is rationally related to a legitimate state interest, policy determinations as to the need for, and the desirability of, the enactment are for the Legislature . . . . [¶] [T]he Legislature retains broad control over the *measure*, as well as the *timing*, of damages that a defendant is obligated to pay and a plaintiff is entitled to receive, and . . . the Legislature may expand or limit recoverable damages so long as its action is rationally related to a

legitimate state interest.' [Citation.]" (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 157-158, original italics.) Thus, the applicable standard of review for assessing defendants' due process claim is the rational relation test. (*Ibid.*; *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 368-369.)

"Civil Code section 3291 has a two-fold purpose. One, it is meant to encourage settlements. Two, it *compensates* personal injury plaintiffs for their loss of the use of their compensatory award during the prejudgment period; the interest makes the plaintiff whole with respect to the loss of use of funds." (*Deocampo v. Ahn* (2002) 101 Cal.App.4th 758, 768-769, fn. 9, citing *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 663-664.) The ten percent rate of interest under Civil Code section 3291 bears a rational relation to the statute's dual purpose of encouraging settlement and compensating plaintiffs during the prejudgment period. That the rate of compensation may exceed current market rates of interest is incentive for the potential debtor to pay. Moreover, rates of interest vary depending upon the transaction. The prime lending rate of interest or mortgage interest rates are generally exceeded by interest rates for other types of transactions.

Because a rational relationship exists between the rate of compensation required by Civil Code section 3291 and the purposes of the statute in encouraging settlement and compensating plaintiffs for their loss of the use of their compensatory award during the prejudgment period, we see no reason to question the Legislature's judgment as to the appropriate rate of interest. (*Fein v. Permanente Medical Group*, *supra*, 38 Cal.3d at pp. 157-158.) "[C]ourts must be cautious not to interfere with proper legislative judgment when considering claims of violation of substantive due process." (*California Rifle and Pistol Assn. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1330.) Civil Code section 3291's ten percent rate of interest does not violate the due process clause of the Fourteenth Amendment.

[The following Disposition is for publication]

DISPOSITION

The judgment is affirmed. The parties will bear their own costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

MOSK, J.

We concur.

TURNER, P. J.

KRIEGLER, J.